



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CRIMINAL DIVISION
HIGH COURT MISC. CRIMINAL NO. 68 OF 2016
PETER A JOSHUA.....ACCUSED
VERSUS
REPUBLIC.....PROSECUTOR
RULING

Introduction

1. The applicant has moved this court vide the application dated 18.11.2016 seeking for orders

1. Spent

2. THAT pending the hearing and determination of this application there be an order of stay of proceedings in Butali SRMCCR. No. 767 of 2015

3. THAT the court file in Butali SRMCC CR. No. 767 of 2015 scheduled for judgment on 22.11.2016 be placed before this Honourable Court to exercise its discretion in Revision of the ruling and subsequent orders made on 14.10.2016 and 21.10.2016 respectively by the Honourable Trial Magistrate Hon. Nabibya SRM whereof the trial Magistrate in spite of the petitioner being represented by an advocate as his constitutional right was denied and forced to proceed with his case knowing that the said advocate was on his way to court and the crucial witnesses who are the clinical officer's and investigating officer's evidence were taken, the prosecution's case closed and the accused later on put on his defence and while being put on his defence while not knowing what to do the trial Magistrate proceeded to fix the said case for judgment on assumption that the petitioner had elected the right to remain silent.

4. THAT the Honourable court be pleased to order transfer of Butali SRMCC CR. No. 767 of 2015 to be heard by a different Magistrate other than Hon. Nabibya SRM.

5. THAT in the alternative the entire proceedings of 14.10.2016 and 21.11.2016 Butali SRMC Case No. 767 of 2015 be set aside varied and/or discharged.

6. THAT any other order that the honourable court may deem expedient, just and fit in the circumstances be granted.

7. THAT the costs of this application be in the cause.

2. The application is premised on the grounds on the face of the said application and supported by the annexed affidavit of the petitioner/applicant sworn on the same date as the application.

3. The main issue on the grounds set out in the application is that the suit at Butali SRMC Cr. Case No. 767 of 2015 was partly heard in the absence of counsel for the petitioner/applicant. A ruling was thereafter made and the petitioner/applicant was put on his defence and after section 200 of the Criminal Procedure Code was explained to him, the petitioner was apparently confused by the whole process and he chose to remain silent and subsequently the matter was fixed for judgment on 22.11.2016 (now past).

4. The petitioner/applicant claims that he has been denied his right of being represented by an advocate of his choice as enshrined in the Constitution and has been greatly prejudiced by the conduct of the trial magistrate who he has lost faith in.

5. The application is not opposed. Even after being served to the office of the Director of Public Prosecutions they have filed neither grounds of opposition nor any replying affidavit.

Submissions and Determination

6. The application was canvassed orally. M. Khayumbi for the petitioner prayed for orders in terms of prayer 2 of the application and urged the court to review the matter since judgment is set for 23.12.2016. I hasten to state here that the prayers Mr. Khayumbi should have prayed for are 3, 4, 5 and 6 and not 2 because prayer 2 seeks an interim in order pending hearing of this application. Mr. Oroni from the ODPD concurred that the Butali case should proceed to hearing and determination on merits. He submitted that the right of the accused person were violated when he was forced to proceed without counsel.

7. In determining this matter this court is aware that it has not seen the proceedings of the Butali court. Be that as it may the Constitution is very clear on the rights of an accused person as envisaged in Article 50(2)(c) (g) (h) and (i). Every accused person has a right to have adequate time and facilities to prepare a defence. The petitioner/applicant was hurriedly put on his defence after the clinical officer and the investigating officer had testified even after he had informed the court that his lawyer was on the way. I find that he was not given adequate time to prepare for his defence. Considering the seriousness of the case against the applicant, the trial court should have exercised its discretion to indulge the applicant until his lawyer arrived at the court to proceed with the further hearing of the case. It is instructive to note that it was not the defence which had been given the last adjournment,

8. It is therefore clear in the mind of this court that by proceeding with the case in the absence of the applicant's counsel, the petitioner's right to have his advocate to represent him was violated. The court knew that the petitioner applicant had an advocate on record. It should have given the petitioner/applicant time to look for his advocate before proceeding with the case to its conclusion. In the circumstances I allow prayer 5 of the application and do order that the entire proceedings of 14th October, 2016 and 21st November, 2016 in Butali SRMC CR. CASE NO. 767 OF 2015 be set aside and the case be set down for further hearing from where it had reached before 14th October, 2016. The case shall continue to be heard by the Hon. M.L. Nabibya. Counsel for the applicant shall move the court for mention of the case within seven (7) days of this ruling for directions as to further hearing dates for the trial.

Orders accordingly

Ruling delivered read and signed in open court at Kakamega this 2nd day of December, 2016

RUTH N. SITATI

JUDGE

In the presence of:-

.....Mr. Khayumbi(present).....for petitioner/applicant

.....Mr. Oroni (present).....for state

.....Mr. Polycarp.....Court Assistant